Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

THE RECTOR, WARDENS AND VESTRYMEN OF ST. JAMES PARISH IN NEWPORT BEACH, CALIFORNIA, *ET AL.*,

Petitioner,

v.

THE PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF LOS ANGELES, *ET AL.*,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of California

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the California Supreme Court violated the First Amendment's Establishment and Free Exercise clauses by interpreting a state statute to confer a special power on certain religious denominations to create trusts for their own benefit in the real property of affiliated local church corporations, solely by declaring that they have unilaterally enacted a post-hoc internal rule, when no other person or entity has such a power under state law?
2. Whether this Court's reference in *Jones v. Wolf*, 443 U.S. 595 (1979), to denominational canons and constitutions as potential sources of neutral principles of property law can be read, consistently with the First Amendment, as trumping other secular laws governing property rights?

PARTIES TO THE PROCEEDING

Petitioners: The Rector, Wardens and Vestrymen of St. James Parish in Newport Beach, California, a California Nonprofit Religious Corporation; The Rev. Praveen Bunyan; The Rev. Richard A. Menees; The Rev. M. Kathleen Adams; James Dale; Barbara Hettinga; Paul Stanley; Cal Trent; John McLaughlin; Penny Reveley; Mike Thompson; Jill Austin; Eric Evans; Frank Daniels; Cobb Grantham; and Julia Houten.

Respondents: The Protestant Episcopal Church in the Diocese of Los Angeles; Jane Hyde Rasmussen; The Right Rev. Robert M. Anderson; The Right Rev. J. Jon Bruno, Bishop Diocesan of the Episcopal Diocese of Los Angeles; The Episcopal Church.

Amici Curiae Below: The Charismatic Episcopal Church, The Rector, Wardens and Vestrymen of All Saints' Parish in Long Beach, California, a California Nonprofit Religious Corporation, The Rev. William A. Thompson, The Rev. Ronald K. White, David Thornburg, Jenna Iovine, Paul Croshaw, Bill Davidson, Vondi Forrester, John Hall, Gail Hauck, Peter Jordan, Dan Kamikubo, Jeff Lang, Jo Smith, Sara Willien, Hon. Fred Woods, The Rector, Wardens and Vestrymen of St. David's Parish in North Hollywood, California, a California Nonprofit Religious Corporation, The Rev. Jose Poch, Dianne Charves, Deborah Chase, William Coburn, Primi Esparza, Laurie Leney, Wendy Leroy, Megan Mcallister, Alwayne Palmer, Janet Palmer, Benson Usiade, Chris Woodrum, The Presbyterian Lay Committee, Iglesia Evangelica Latina, Inc., Juan A. Reyes, Aida Haydee Reyes, Ahuner Portillo, Audias

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Presbyterian Church (U.S.A.), the Synod of Southern California and Hawaii and the Presbytery of Hanmi on behalf of Respondents Jane Hyde Rasmussen; The Right Rev. Robert M. Anderson; The Protestant Episcopal Church in the Diocese of Los Angeles; The Right Rev. J. Jon Bruno, Bishop Diocesan of the Episcopal Diocese of Los Angeles.

Clifton Kirkpatrick, Joey Mills, Katherine J. Runyeon, Rev. Joseph Lee, Elder John Lococo, General Council on Finance and Administration of the United Methodist Church, Wesley Granberg-Michaelson, General Conference of the Seventh-day Adventists, Christian and Missionary Alliance, International Church of the Foursquare Gospel, Worldwide Church of God, and Holy Apostolic Catholic Assyrian Church of the East on behalf of Respondent The Episcopal Church.

CORPORATE DISCLOSURE STATEMENT

Petitioner The Rector, Wardens and Vestrymen of St. James Parish in Newport Beach, California, is a membership California nonprofit religious corporation with no parent corporation or stock.

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INTRODUCTION

Since 1950, Petitioner The Rector, Wardens and Vestrymen of St. James Parish in Newport Beach, California ("St. James Church"), a separate nonprofit religious corporation under California law, has held clear title to church property in Newport Beach, California. Following a series of doctrinal disputes with the Episcopal Church and its diocese in Los Angeles, California (Respondents here, collectively "Episcopal Church"), the branch of the worldwide Anglican Communion of churches with which St. James Church was originally affiliated, St. James Church voted to affiliate with a different branch of the Anglican Communion. The Los Angeles Diocese sued to take St. James Church's property. Although the deeds are unambiguously held in the name of the St. James Church corporate entity, the Episcopal Church claim the property by virtue of a disputed 1979 amendment to the Canons of the Episcopal Church (alleged by the Episcopal Church to have been adopted thirty years after St. James Church first took clear title to the property), by which the broader Church association unilaterally claimed for itself a trust interest in the property of St. James Church.

While ostensibly applying the neutral principles of law approach commended by this Court in *Jones v. Wolf*, 443 U.S. 595 (1979), the California Supreme Court interpreted Section 9142(c) of the California Corporations Code to permit churches claiming to be hierarchical to unilaterally create a trust interest for their own benefit in property in which legal title is held by an affiliated local church corporation, thus

giving dispositive and retroactive weight to the disputed 1979 Canon while disregarding other neutral principles including deeds and property statutes.

The issues thus presented by this petition involve whether the California Court's application of *Jones* and its interpretation of Section 9142(c) impermissibly prefer self-proclaimed hierarchical denominations to other churches and intrude into areas of religious doctrine and polity in violation of the First Amendment's Establishment and Free Exercise clauses. The important constitutional issues involved include (1) whether civil courts may, consistent with the First Amendment, decide that a religion is purely hierarchical where the matter is theologically disputed; and (2) whether such an *ecclesiastical* determination can be permitted to allow the purported hierarchical denomination to adopt, unilaterally, post-hoc rules creating a trust interest for itself, trumping undisputed *legal* title held by the local religious corporation.

Review by this Court of the important constitutional issues at stake is warranted.

OPINIONS BELOW

The opinion of the Supreme Court of California, as modified on denial of rehearing, is reported at 198 P.3d 66 (Petitioners' Appendix ("Pet. App.") at 1a-43a). The opinion of the Court of Appeal is reported at 61 Cal.Rptr.3d 845 (Cal. Ct. App. 4th Dist. 2007) (Pet. App. at 44a-148a). The orders of the trial court dismissing the two amended complaints with prejudice are reproduced at Pet. App. 149a-169a. The order denying the petition for rehearing on February 25, 2009, is reproduced at Pet. App. 170a.

STATEMENT OF JURISDICTION

The decision of the Supreme Court of California was entered on January 5, 2009 (Pet. App. 1a). A timely petition for rehearing was denied, and the opinion modified, on February 25, 2009. (Pet. App. 170a). A timely request for extension was granted by Justice Kennedy, extending the time in which to file this petition until June 25, 2009. The jurisdiction of this Court is proper under 28 U.S.C. § 1257(a) on the ground that California Corporations Code Section 9142(c), as interpreted by the Supreme Court of California, is repugnant to the Constitution of the United States, specifically, the Establishment and Free Exercise clauses of the First Amendment, as incorporated and made applicable to the States by the Fourteenth Amendment.

Although the case has been remanded for further proceedings, the California Supreme Court's decision below is a final interpretation of Section 9142(c), and it is final with respect to that Court's determination that its interpretation is constitutionally valid. The judgment is therefore "final" for purposes of Section 1257(a) under well-established exceptions to the finality rule. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-83 (1975) (describing fourth category of exceptions as "those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds").[1]

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[1] Petitioners do not contend that this case fits within *Cox Broadcasting*'s third category of exceptions, "in which later re-

Because neither the State of California nor any agency, officer, or employee thereof is a party to this action, 28 U.S.C. § 2403(b) may apply; this Petition is therefore being served concurrently on the Attorney General of California.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the Constitution of the United States provides, in relevant part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . . .

The Fourteenth Amendment provides, in relevant part:

> No State shall . . . deprive any person of life, liberty or property, without due process of law; nor deny to any person the equal protecttion of the laws.

Section 9142 of the California Corporations Code provides, in relevant part:

> (c) No assets of a religious corporation are or shall be deemed to be impressed with any trust, express or implied, statutory or at common law unless one of the following applies:
>
> > (1) Unless, and only to the extent that, the assets were received by the corporation with an express commitment by resolution

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view of the federal issues cannot be had, whatever the ultimate outcome of the case." *Cox Broadcasting*, 420 U.S., at 481.

of its board of directors to so hold those assets in trust.

(2) Unless, and only to the extent that, the articles or bylaws of the corporation, or the governing instruments of a superior religious body or general church of which the corporation is a member, so expressly provide.

(3) Unless, and only to the extent that, the donor expressly imposed a trust, in writing, at the time of the gift or donation.

(d) Trusts created by paragraph (2) of subdivision (c) may be amended or dissolved by amendment from time to time to the articles, bylaws, or governing instruments creating the trusts. However, nothing in this subdivision shall be construed to permit the amendment of the articles to delete or to amend provisions required by Section 214.01 of the Revenue and Taxation Code to a greater extent than otherwise allowable by law.

STATEMENT OF THE CASE

Since its incorporation in 1949, St. James Church and its congregation have worshipped at the St. James Church property in Newport Beach, California. The church property now includes a 7800-square-foot church, a fellowship hall, administrative offices, Sunday school classrooms, a rectory, and adjoining parking. The congregation is part of the thirty-eight member worldwide Anglican Communion that dates to King Henry VIII's break in 1534 from the Roman Catholic Church. Pet. App. 3a. Un-

til 2004, St. James Church was also affiliated with respondent The Episcopal Church, the branch of the Anglican Communion most prevalent in the United States. The Episcopal Church is an unincorporated association headquartered in New York City, and comprises Episcopal dioceses in the United States, including respondent The Protestant Episcopal Church in the Diocese of Los Angeles ("The L.A. Diocese").

Unlike the Roman Catholic Church, in which each individual Church property is typically held in the name of the bishop who heads the geographically-based diocese in which the particular church is located, *see* Stephen M. Bainbridge and Aaron H. Cole, *The Bishop's Alter Ego,* 46 J. Catholic Legal Studies 65, 69 (2007), title to the St. James Church property has, with a single brief exception, always been held in the name of the local corporation.[2]

In 1979, thirty years after St. James Church was incorporated and began taking title to its properties, the Episcopal Church purportedly added Canon I.7.4 (the "Dennis Canon") to its Church Canons. The Dennis Canon unilaterally asserted that all church property held in the name of individual local, and separately incorporated, churches such as St. James Church is held in trust for the Episcopal Church and the local diocese. Although the corporate articles of

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[2] The L.A. Diocese served as a mere conduit for the donation of one parcel of property by a private Newport Beach business in 1950, and promptly transferred it to St. James Church for consideration without any reservation of a reversionary or trust interest. All subsequent parcels of property were purchased by St. James Church with its own funds raised from its members.

St. James Church previously referenced the Canons, nothing like the Dennis Canon, purporting to create a trust interest in local church property, existed at the time those articles were adopted, and no deed conveying the purported trust interest from St. James Church was ever executed.

As the result of significant theological disagreements with the Episcopal Church over whether to reassert core doctrines of the Christian faith or to reappraise those doctrines in light of modern social developments, the Board of St. James Church decided in July 2004 to end its association with the Episcopal Church and affiliate instead with the Anglican Church of Uganda, another national member church of the thirty-eight member worldwide Anglican Communion. The Board's decision was overwhelmingly ratified by the members of St. James Church at a special meeting on August 16, 2004. One week later, the members approved an amendment to St. James Church's articles of incorporation deleting all references to the L.A. Diocese, the Episcopal Church, and their constitutions and canons by a vote of 341 to 4. The amended articles of incorporation were accepted for filing by the Secretary of State of California on August 24, 2004. Pet. App. 51a.

In response to St. James Church's change of Anglican affiliation, the L.A. Diocese, together with two of its bishops and a single former lay member of St. James, sued St. James Church, its volunteer directors, and three of its clergy,[3] alleging *inter alia* that

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[3] The individual defendants, also petitioners here, are the then Rector, two priests, two Wardens, and individual volunteer Vestrymen of St. James Church. We refer in this Petition to all

St. James Church forfeited its property because of the disaffiliation and that the volunteer directors breached their fiduciary duties by disaffiliating from the Episcopal Church. The L.A. Diocese's Complaint sought a declaration enforcing a trust in its favor in the real and personal property of St. James Church, reversing the disaffiliation and forcing St. James Church to remain Episcopalian. It even sought punitive damages against the individual volunteer directors of St. James Church.

The national Episcopal Church thereafter filed a Complaint-in-Intervention seeking a judicial declaration that all property held by St. James Church is impressed with a trust in favor of the denomination.

St. James Church filed a special motion to strike the L.A. Diocese's complaint as a strategic lawsuit against public participation.[4] The trial court granted the motion, and also sustained without leave to amend St. James Church's demurrer against the Episcopal Church's first amended Complaint-in-Intervention.

The L.A. Diocese and the Episcopal Church both appealed the decision. In a break with well-established California precedent applying neutral principles of law for resolution of church property disputes[5]—the approach approved and even encour-

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of the defendants/petitioners collectively as "St. James Church."

[4] *See* Cal. Civ. Proc. Code § 425.16.

[5] *See, e.g., Guardian Angel Polish Nat'l Catholic Church of L.A., Inc. v. Grotnik*, 118 Cal.App.4th 919, 930 (Cal. Ct. App. 2004); *Protestant Episcopal Church v. Barker*, 115 Cal.App.3d 599, 614 (Cal. Ct. App. 1981).

aged by this Court in *Jones*—the Court of Appeal reversed, holding that it was required to defer to the determinations of the highest church authority in the hierarchical church that the Episcopal Church claimed itself to be. Pet. App. 147-148a. The Court of Appeal also held that Section 9142(c) of the California Corporations Code permitted a religious entity claiming to be a superior governing body in a hierarchical church to unilaterally establish a trust for its own benefit in property in which record title was vested in another entity. Pet. App. 121a-122a.

St. James Church sought review by the Supreme Court of California, specifically noting that the neutral principles of law approach, rather than the hierarchical deference approach adopted by the Court of Appeal, allowed for the resolution of church property disputes "without entangling courts in religious disputes, favoring or establishing any particular religious form, or interfering with the free exercise of religion by any group, large or small." Petitioners' Opening Brief on the Merits at 15-16 (Nov. 13, 2007), *Episcopal Church Cases*, 198 P.3d 66 (2009) ("POBM"). St. James Church contended that in the wake of *Jones*, this Court's decisions in such cases as *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871), *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929), and *Serbian Eastern Orthodox Diocese of U.S. v. Milivojevich*, 426 U.S. 696 (1976), "illustrate that a 'deference' approach is appropriate *only* where the dispute cannot be determined without making a religious determination"—not for routine property disputes that can be decided according to neutral principles of state law. POBM at 22-24. "[T]he 'deference' rule actually leads civil courts

straight into the constitutional quagmire of deciding religious questions preliminary to the rule's application, and of furthering certain forms of religion over others," noted St. James Church, and is therefore unconstitutional because it forces the courts to resolve contested theological questions about the nature and scope of a church hierarchy, gives preference to hierarchical churches over congregational churches, and interferes with the free exercise religious choices of denominations that choose to have a balance of local and general authority. POBM at 30-35, 48.

The Supreme Court of California affirmed the Court of Appeal's decision, but on different grounds. Recognizing that the method used by a state for resolving church property disputes "must not violate the First Amendment to the United States Constitution," Pet. App. 11a-12a, the Court purported to adopt a neutral principles of law approach, relying on this Court's recitation of sources to be considered, "such as the deeds to the property in dispute, the local church's articles of incorporation, the general church's constitution, canons, and rules, and relevant statutes, including statutes specifically concerning religious property." Pet. App. 24a (citing *Jones*, 443 U.S., at 600).

The California Supreme Court then elevated a purported church rule over record title and state property laws by interpreting Section 9142(c) of the Corporations Code to permit a self-proclaimed hierarchical denomination to unilaterally create a trust interest for its own benefit in property unambiguously owned by the local church corporation. In so doing, the Court expressly rejected the contention by

St. James Church that the interpretation it was adopting "would unconstitutionally promote and establish denominational religion." Pet. App. 35a-36a.

The Court also found that the disputed canon could create a trust in favor of the denomination decades after St. James Church first held clear record title mainly because St. James Church had generally agreed thirty years earlier "to be bound by the constitution and canons of the Episcopal Church," Pet. App. 24a, neither of which contained a trust provision at the time.

In a concurring and dissenting opinion, Justice Kennard took issue with the majority's claim that it was applying a neutral principles of law approach. Noting that "[n]o principle of trust law exists that would allow the unilateral creation of a trust by the declaration of a nonowner of property that the owner of the property is holding it in trust for the nonowner," Justice Kennard contended that the majority had applied "the principle of government [or deference to hierarchy] approach," interpreting Section 9142(c) to create "a special principle applicable solely to religious corporations." Pet. App. 41a-43a.

St. James Church filed a petition for rehearing asking the Court to clarify its ruling in light of the procedural posture of the case (namely, dismissal at the trial court before St. James Church had answered the two first amended complaints). The Court denied the petition for rehearing on February 25, 2009, but modified its opinion to reflect that the holding was based on the existing record before it.

REASONS FOR GRANTING THE WRIT

I. The California Supreme Court Has, By "Legislative Fiat," Empowered Self-Proclaimed Hierarchical Churches to Unilaterally Create Trust Interests For Themselves in the Property of Affiliated Local Church Corporations, Impermissibly Preferring Hierarchical Religion and Infringing on the Free Exercise Rights of Local Congregations.

The California Supreme Court held that Section 9142(c) of the California Corporations Code allowed a hierarchical church to create, unilaterally, a trust interest in property titled in the name of separately incorporated local churches affiliated with it.[6] As Justice Kennard pointed out in her concurring and dissenting opinion, the Court's interpretation of Section 9142(c) means that "through legislative fiat a 'superior religious body or general church' may *unilaterally* create trusts in its favor over property held by the smaller church that was a member of the general church when the trust was created." Pet. App. 41a. That "legislative fiat," Justice Kennard correctly noted, "creates a special principle applicable solely to religious corporations." *Id.*, at 43a.

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[6] While not addressing whether a "superior religious body" or "general church" could waive its purported trust interest in a particular case, or not enforce it where an affiliated local church never agreed to be bound by denominational rules, the interpretation of Section 9142(c) adopted by the California Supreme Court is final, and the constitutionality of that interpretation is now a matter for resolution by this Court.

Although Justice Kennard mistakenly believed that such preferential treatment was constitutional "only because the dispute involves religious bodies and then only because the principle of government approach, permissible under the First Amendment, allows a state to give unbridled deference to the superior religious body or general church," Pet. App. 42a, this Court has never allowed "unbridled deference" to *all* claims that might be made by a hierarchical church. Rather, even for purely hierarchical churches (and certainly for semi-hierarchical, mixed churches), the courts only owe deference "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried," not to temporal matters that do not involve spiritual determinations. *Watson v. Jones*, 80 U.S. (13 Wall.), at 727; *cf. Milivojevich*, 426 U.S., at 734 (Rehnquist, J., dissenting) (criticizing "blind deference" even to ecclesiastical decisions of hierarchical churches as creating "serious problems under the Establishment Clause").

Nor has this Court allowed in non-property-dispute contexts the creation of special, preferential rules available only to certain religious denominations and not others (other than those that merely accommodate religious belief and practice). Just as a statute that targets certain religions for disfavored treatment is an unconstitutional interference with free exercise rights (absent a compelling governmental interest), *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993), so, too, a statute that treats some religious denominations more favorably than others is an unconstitutional

establishment of religion, *Larson v. Valente*, 456 U.S. 228, 246 (1982) (citing *Everson v. Board of Ed.*, 330 U.S. 1, 15 (1947)).

Here, the California Court's interpretation of Section 9142(c) has given to general church associations the ability to unilaterally create for themselves a trust interest in property to which a local affiliated church corporation holds clear record title, merely because the general church association claims to be a superior body in a hierarchical church structure. This prefers certain kinds of religious organizations over others, in violation of the Establishment Clause. It also interferes, in violation of the Free Exercise Clause, with the deliberate religious choices of local church congregations that have chosen to affiliate for ecclesiastical purposes but not for other purposes such as property ownership, particularly where, as here, the local church has attempted through incorporation to secure its property interests so that any decision to dissociate because of doctrinal disputes would not also carry with it the costly burden of abandoning the place of religious worship purchased and maintained by the local congregation.

The statutory conferral of such unilateral authority is not necessary to protect the free exercise rights of congregations preferring a purely hierarchical religious structure. Explicit trusts in favor of the denomination can easily be created by any donor or property owner who prefers such a structure. *See, e.g.*, Cal. Prob. Code § 15200. Or record title to the local property can be held by the higher ecclesiastical authority as a "corporation sole," as Roman Catholic Bishops hold title to the local church property located within their diocese. *See, e.g.* Cal. Corp.

Code § 10002 ("A corporation sole may be formed under this part by the bishop, chief priest, presiding elder, or other presiding officer of any religious denomination, society, or church, for the purpose of administering and managing the affairs, property, and temporalities thereof"). The use of such "pure" neutral principles of law actually accommodates a much broader range of religious choices than a neutral principles approach that, through preferential statutes and judicial deference to denominational rules, tilts the balance decidedly toward often-disputed assertions of hierarchical authority. *Cf.* K. Greenawalt, *Hands Off! Civil Court Involvement In Conflicts Over Religious Property*, 98 Colum. L. Rev. 1843, 1851 (1998) (noting that the deference-to-hierarchy approach "effectively restricts the options of church members either to keeping final authority in local congregations or to leaving ultimate decisions about authority to superior tribunals").

A "pure" neutral principles approach is also more consistent with this Court's recent religion clause jurisprudence. The hallmark in current Free Exercise doctrine is "valid and neutral laws of general applicability." *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982)). One of the standards under the Establishment Clause is non-preferentialism. *See, e.g., Rosenberger v. Rector*, 515 U.S. 819, 880 (1995) (Thomas, J., concurring) ("the Framers saw the Establishment Clause simply as a prohibition on governmental preferences for some religious faiths over others"). Although this Court in *Jones* did not explicitly derive its neutral principles of law standard "from standard free exercise and es-

tablishment tests," Greenawalt, *supra*, at 1845, the resemblance is clear, and appropriate.

Because the California Court's interpretation of Section 9142(c) raises important constitutional issues that have not been, but should be, resolved by this Court, certiorari is warranted. That the California Court's decision flows from the application (or misapplication) of the neutral principles of law approach commended by this Court in *Jones*, as described below, makes this Court's review even more appropriate.

II. By Deferring to Contested Church Canons Rather Than Secular Documents Such As Deeds of Title in Its Application of Neutral Principles of Law, the California Supreme Court Decided Important Questions of First Amendment Law That Have Not Been, But Should Be, Resolved By This Court.

A. *Jones* did not address the extent to which church canons were an appropriate source of neutral principles of law in cases where a court must decide how a church is structured.

In *Jones*, this Court approved, and indeed commended, a neutral principles of law approach for deciding church property disputes. "[S]ettling a local church property dispute on the basis of the language of the deeds, the terms of the local church charters, the state statutes governing the holding of church property, and the provisions in the constitution of

the general church concerning the ownership and control of church property," noted the Court, "entailed 'no inquiry into religious doctrine.'" 443 U.S., at 603 (summarizing prior *per curiam* holding in *Maryland & Va. Eldership of Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367 (1970) (*"Maryland & Va. Churches"*)).

Jones addressed a dispute between a local church and the general Presbyterian church, a church which this Court has described as hierarchical. *Jones*, 443 U.S., at 597; *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 442 (1969). The *Jones* Court's inclusion of the constitution of a general church in its litany of sources of neutral principles of law may be appropriate where the hierarchical nature of the general church is uncontested, as in *Jones* itself. But where, as here, the scope and nature of any asserted hierarchy is itself in dispute, where "the locus of control" is "ambiguous," the *Jones* Court strongly suggested that a searching inquiry of church constitutions and other relevant documents would be "impermissible." *Jones*, 443 U.S., at 605.

Yet that is exactly what the California Supreme Court has required in interpreting Section 9142(c) as empowering denominations that claim to be hierarchical to unilaterally impose trust rules, because civil courts must first determine, as a threshold inquiry under Section 9142(c), whether one religious body is "superior" to another, or whether a church is "general" or not. Trial court judges are not expert in church government or structure, or how religious groups are affiliated with one another, particularly in today's society with hundreds if not thousands of

diverse religious groups, nor should they have to be as this "searching inquiry" unconstitutionally entangles courts in religion. Merely deferring to a denomination's description of its own structure does not solve the problem because, as here, denominational claims of "hierarchy" are often disputed or more complex than meets the eye.

Neither did the *Jones* Court confront the additional circumstance presented here, where some of the sources of neutral principles of law (such as the deeds) are in conflict with others (such as the canons of the denomination as they are alleged by one side in the litigation), or grapple with whether giving greater weight to denominational rules amounted to a rule of deference to a disputed hierarchical claim rather than application of neutral principles of law.

As this case makes manifestly clear, the *Jones* Court's litany of sources of neutral principles of law requires refinement in light of such circumstances, lest the courts be required to make the very kind of religious determinations that the neutral principles doctrine was designed to avoid. *See, e.g.*, Greenawalt, *supra*, at 1846 ("the Supreme Court should make certain revisions to [its two-alternatives] regime, treating as unconstitutional the 'standard' version of polity-deference and certain versions of neutral principles"). Quite simply, certiorari is warranted so that this Court can address whether post-hoc alterations in the constitution and canons of a general church, the hierarchical authority of which is contested, can trump local church ownership plainly reflected in property deeds consistently with neutral principles of law and the commands of the First Amendment.

B. By giving dispositive weight to a contested Church Canon, the Court below effectively decided core questions of religious doctrine and polity.

In apparent response to the decision in *Jones*, many mainline Protestant churches—both hierarchical and semi-hierarchical—adopted canons and rules purporting to create trust interests in the church property of affiliated local churches. Absent express agreement by the local church property owner, such provisions amounted to the unilateral declaration of a trust interest by the beneficiary of the trust, without any conveyance of a trust interest by the record owner of the property, and contrary to the statute of frauds in most states, including California. Cal. Prob. Code § 15206 ("A trust in relation to real property is not valid unless evidenced by . . . a written instrument signed by the trustee . . . or settlor").

That is not what the *Jones* Court had in mind. Read in context, *Jones*'s reference to church constitutions and rules is limited to documents that are the product of *mutual* agreement between the parties: "[T]he *parties* can ensure, if *they* so desire, that the faction loyal to the hierarchical church will retain the church property. *They* can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church. Alternatively, the constitution of the general church can be made to recite an *express* trust in favor of the denominational church. . . . [C]ivil courts will be bound to give effect to the result indicated by *the parties, provided it is embodied in some legally cognizable form*." *Jones*, 443 U.S., at 606 (emphasis added).

The need for express consent by the local church —the property owner—is unmistakable. *Jones* did *not* authorize national denominations to confiscate the property of affiliated local churches by canon fiat; all *Jones* invited was *mutual* pre-dispute agreements as to property ownership. The neutral principles method thereby retains its secular character, enforcing canons only if they qualify as traditionally expressed mutual agreements that comply with state property laws—thus obviating any concern about a civil court evaluating church documents.

Yet the Court below, purportedly following neutral principles of law, subordinated clear record title and longstanding state property laws to the 1979 amendment purportedly adopted by the Episcopal Church in the wake of *Jones*. Known as the "Dennis Canon," Canon I.7.4 of the canons of the general convention of the Episcopal Church provides:

> All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission or Congregation is located. The existence of this trust, however, shall in no way limit the power and authority of the Parish, Mission or Congregation otherwise existing over such property so long as the particular Parish, Mission or Congregation remains a part of, and subject to, this Church and its Constitution and Canons.

Although the Dennis Canon may have been ratified by the general convention,[7] at no time did St. James Church ever expressly agree to anyone else having a trust interest in its property, or convey such a trust interest to the Episcopal Church, a statutory prerequisite for the creation of a trust interest in real property. Cal. Prob. Code § 15206. Rather, St. James Church simply agreed in its 1949 corporate charter to be bound "for the time being", Pet. App. 4a, by the canons of the Episcopal Church that complied with state law, which at the time contained no such provision asserting a trust interest in local church property. Basic hornbook law on voluntary associations does not allow a denomination to unilaterally amend its rules in order to divest a local church of property in which the local church has record title. 6 Am. Jur. 2d, Associations and Clubs § 6 ("*bylaws or rules cannot be enforced when they compel a citizen to lose his rights in accumulated assets* or to forego the exercise of other rights which are constitutionally inviolable" (emphasis added)); *cf. Budwin v. Am. Psychological Ass'n*, 24 Cal.App.4th 875, 879 (1994) ("a court will prohibit a private, voluntary association from enforcing a rule which is contrary to established public policy").

By elevating the disputed Dennis Canon over clear record title and hornbook trust law, the Court below necessarily accepted the Episcopal Church's doctrinal contention that it was a purely hierarchical church and thus "superior" or "general" under Section 9142(c), despite St. James Church's argument

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[7] As the Court below noted, whether the Dennis Canon was ratified by the general convention is disputed. Pet. App. 36a.

and reputable scholarly commentary to the contrary, POBM at 31-32; Raymond J. Dague & R. Wicks Stephens II, "Considerations Specific to Episcopalians," in A GUIDE TO CHURCH PROPERTY LAW: THEOLOGICAL, CONSTITUTIONAL AND PRACTICAL CONSIDERATIONS 124, 129-35 (L. Lunceford, gen. ed., 2006) (contending that the Episcopal Church has a mixed sort of polity but that it is congregational with respect to property issues).[8] The Court below

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[8] The distinction between hierarchical churches (such as the Roman Catholic Church and the Church of Jesus Christ of Latter Day Saints) and congregational churches (such as those in the Baptist and Evangelical Free traditions) is more properly characterized as a continuum rather than a bright line, but this Court has generally treated the issue as a dichotomy between purely hierarchical and purely congregational denominations. *Jones*, 443 U.S., at 619 (Powell, J., dissenting); Greenawalt, *supra*, at 1851 ("The Court's treatment disregards . . . the possibility of a mix of authority"). Because most of the mainline Protestant denominations fall somewhere between the two poles, that dichotomy is overly simplistic, makes it more difficult for the courts to give effect to the full range of religious choices that the various denominations have made, and would seem to "establish" an inaccurate religious dichotomy. In fact, the Presbyterian Lay Committee filed an amicus brief before the California Supreme Court in this case disputing that the Presbyterian Church (U.S.A.) is hierarchical, and St. James Church likewise contends that the Episcopal Church is not hierarchical in matters of property and polity, and thus not a "superior religious body" within the meaning of Section 9142(c). "A church may . . . be hierarchical in some matters and congregational in others. For example . . . a church may be hierarchical in terms of internal administration and discipline, and yet congregational as far as control and use of its property is concerned." *The Primate & Bishops' Synod of the Russian Orthodox Church Outside Russia v. The Russian Orthodox Church of the Holy Resurrection, Inc.*, 617 N.E.2d 1031, 1033 (1993) (internal quotations omitted), *aff'd*, 418 Mass. 1001, 636 N.E.2d

thereby effectively resolved this church property dispute "on the basis of religious doctrine and practice," the very First Amendment violation that the neutral principles doctrine was designed to avoid. *Jones*, 443 U.S., at 602 (citing *Milivojevich*, 426 U.S., at 710; *Maryland & Va. Churches*, 396 U.S., at 368; *Hull*, 393 U.S., at 449).

Moreover, in opining that the Episcopal Church is a "superior religious body" or "general church" under Section 9142(c), the Court below appears to have relied on "religious precepts"—namely, its acceptance of the Episcopal Church's claim that it is spiritually and traditionally hierarchical—rather than on "purely secular terms" for a property dispute, as this Court in *Jones* required. *Jones*, 443 U.S., at 604.

More than mere error, this case highlights the very situation reserved in *Jones*, namely, when a key threshold issue to be resolved prior to application of state law is whether a particular church is purely hierarchical, purely congregational, or semi-hierarchical in nature.[9] To look to denominational rules for guidance, while disregarding well-established neutral principles of secular law like

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211 (1994). "Not every church is as intentionally hierarchical as the Roman Catholic Church." Greenawalt, *supra*, at 1851.

[9] It is significant to note that in none of the Supreme Court's "neutral principles" precedents was the hierarchical structure of the churches a contested issue. *See Jones*, 443 U.S., at 597-98; *Hull*, 393 U.S., at 441; *Milivojevich*, 426 U.S., at 698. In contrast, in *Watson*, the Court distinguished case law dealing with congregational churches and concluded that in congregational churches, "the rights of such bodies to use of the property must be determined by the ordinary principles which govern voluntary associations." *Watson*, 80 U.S., at 703, 724-25.

deeds and the statute of frauds, is to decide the question, and decide it by resort to core religious precepts. This, the courts cannot do, consistent with the Establishment Clause of the First Amendment. *Hull*, 393 U.S., at 449-50; *cf.* Greenawalt, *supra*, at 1877 ("the polity approach requires an initial decision about the nature of a church's government. . . . The crucial question is whether courts can identify principles of church government without reference to doctrine (or perhaps disputed doctrine)").

Moreover, allowing purported claims of hierarchy to trump local church incorporation, deeds and state property statutes, effectively disregards, as here, that the property at issue was donated or purchased by the local church, not the denomination, and thus infringes on the Free Exercise rights of the local congregation. *See, e.g.*, Jeffrey B. Hassler, *A Multitude of Sins?*, 35 Pepperdine L. Rev. 399, 408 (Jan. 2008) (citing Patty Gerstenblith, "Civil Court Resolution of Property Disputes Among Religious Organizations," in RELIGIOUS ORGANIZATIONS IN THE UNITED STATES 317 (James A. Serritella et al. eds., 2006)). Local churches with property would have to avoid affiliating with a denomination for fear of losing their property, or risk losing their property, even decades later, when they exercise their religious freedom to associate with another denomination. Greenawalt, *supra*, at 1851 (noting that the deference-to-hierarchy approach "effectively restricts the options of church members either to keeping final authority in local congregations or to leaving ultimate decisions about authority to superior tribunals"). Judicially forcing churches into a hierarchical-congregational dichotomy as a threshold inquiry to

resolve a property dispute does not recognize that today, many Protestant churches, including the Episcopal Church, do not have such neat categories of polity.

The time is ripe for this Court to clarify *Jones v. Wolf* and provide the lower courts with further guidance on the significant constitutional questions implicated when the scope and nature of the hierarchy is itself a disputed question. A holding by this Court that pure neutral principles of property law, without deference to the implicit or explicit doctrinal determinations found in church constitutions, would go a long way toward eliminating the constitutional problems inherent in the methodology adopted by the California Court below.

III. The State Courts Are Split On How, And Even Whether, To Apply Neutral Principles of Law When Assertions of Hierarchical Authority Are Contested.

The California Court is not the only Court to have grappled with the *Jones* formulation of neutral principles of law in the context of a semi-hierarchical church and, not surprisingly, the lower courts have resolved the issue in different and conflicting ways. The conflict is not limited to different policy decisions being made by state courts or state legislatures, as is permitted in our federal system, but rather involves radically different interpretations of what the Constitution compels, permits, and prohibits.

The state court split is perhaps most evident in the two cases now pending before this Court, one from Arkansas and this case from California. Both

involve property in which the local church has record title. Both involve claims to the property by a broader church association with which the local church had been affiliated. Both involve provisions in the documents of the broader church, adopted in the wake of this Court's decision in *Jones*, purportedly establishing a trust interest in the local church's property. And in both cases, the purported trust was created by the general church, for its own benefit, long *after* the local church had acquired title to the property in its own name and without the written consent of the local church. The Arkansas Supreme Court, ruling in favor of the local church, held that "courts must settle the [property] dispute by applying neutral principles of law," including the law found in both California and Arkansas that trust interests can only be created by the trustee, not unilaterally by the purported beneficiary of the trust. *Arkansas Annual Conf. of AME Church, Inc. v. New Direction Praise & Worship Ctr, Inc.*, 375 Ark. 428, 2009 WL 223122, *4-*5 (Ark. Jan 30, 2009), *petition for certiorari filed* (Apr 30, 2009) (No. 08-1352).

In stark contrast, the California Court below, purportedly applying the same neutral principles of law methodology approved by this Court in *Jones*, ruled for the denomination, holding that "[i]n a hierarchically organized church, the 'general church' *can* impress a trust on a local religious corporation of which the local corporation is a 'member' *if* the governing instruments of that superior religious body so provide." Pet. App. 35a. In reaching its conclusion, the California Court rejected the provision in California law that "[t]he owner of the legal title to property is presumed to be the owner of the full benefi-

cial title," Pet. App. 36a (citing Cal. Evid. Code § 662), and simply ignored the requirement in California law that "[a] trust in relation to real property is not valid unless evidenced by . . . a written instrument signed by the trustee . . . or settler," Cal. Prob. Code § 15206.[10]

The California Court also rejected as immaterial the fact, important in Arkansas, Alabama, Connecticut, and elsewhere, that the purported trust interest was added to the denomination's canons long *after* the local church had agreed to the canons in effect when it had taken title to the property free of any trust interest. *Compare* Pet. App. 33a-34a *with Arkansas Presbytery of Cumberland Presbyterian Church v. Hudson*, 40 S.W.3d 301, 309-10 (Ark. 2001) (holding that "neutral principles" required that the courts consider the canons of the general church in place at the time of the property conveyance, not a subsequently-enacted canon); *African Methodist Episcopal Zion Church in Am., Inc. v. Zion Hill Methodist Church, Inc.*, 534 So.2d 224, 225 (Ala. 1988) (holding property owned by the general church because "[f]or the entire time" the local church was affiliated with it, the general church discipline provided that local church property was held in trust for the general church); *New York Annual Conf. of United Methodist Church v. Fisher*, 438 A.2d

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[10] The New York Court of Appeals similarly gave "dispositive" weight to denominational rules even though, "applying the neutral principles of law approach," it found "nothing in the deeds," "certificate of incorporation" of the local church, or state statutes that established an express trust in favor of the denomination. *Episcopal Diocese of Rochester v. Harnish*, 899 N.E.2d 920, 924-25 (N.Y. 2008).

62, 74 (Conn. 1980) (remanding for trial court to consider "what the provisions of the Book of Discipline were at the various times at which the various pieces of property were acquired").

The state courts are also split on whether the Constitution mandates or forbids a neutral principles approach in cases involving hierarchical and semi-hierarchical churches. The supreme courts of Louisiana and Alabama, and an intermediate appellate court in Illinois, for example, have held that the neutral principles approach is constitutionally compelled. *Fluker Cmty. Church v. Hitchens*, 419 So.2d 445, 447 (La. 1982) ("the safeguards against laws establishing religion and prohibiting the free exercise thereof contained in the First Amendment and in [the nearly identical provision found in Art. I, § 8 of the Louisiana Constitution] *necessitate . . . adoption of the 'neutral principles' approach*" (emphasis added)); *Trinity Presbyterian Church of Montgomery v. Tankersley*, 374 So.2d 861, 866 (Ala.1979) ("the courts *must* decide the property disputes by looking at so-called 'neutral principles of law' and not resolve the underlying controversies over religious doctrine" (citing *Hull*, 393 U.S. 440, at 449) (emphasis added)); *York v. First Presbyterian Church of Anna*, 474 N.E.2d 716, 719 (Ill. App. Ct. 1984) ("where the litigation involves only the issue of property control, the *Watson* [hierarchical-deference] standard fails as a constitutional imperative"). Such holdings are not surprising, given this Court's acknowledgment in *Jones* that where the locus of hierarchical control is ambiguous, applying a "rule of compulsory deference" "would appear to require 'a searching and therefore impermissible' inquiry into church polity.'"

Jones, 443 U.S., at 605 (quoting *Milivojevich*, 426 U.S., at 723)); *see also Maryland & Va. Churches*, 396 U.S., at 369 (Brennan, J., concurring) ("To permit civil courts to probe deeply enough into the allocation of power within a church so as to decide where religious law places control over the use of church property would violate the First Amendment in much the same manner as civil determination of religious doctrine").[11]

Other state courts have recognized "that the majority opinion in *Jones* expressed a clear preference for the neutral principles approach over the polity [hierarchical-deference] approach." *Bishop & Diocese of Colo. v. Mote*, 716 P.2d 85, 94-95 (Colo. 1986) (en banc); *St. Paul Church, Inc. v. Board of Trustees of Alaska Missionary Conf. of United Methodist Church, Inc.*, 145 P.3d 541, 551 (Alaska 2006); *Bjorkman v. Protestant Episcopal Church in U.S. of Am. of Diocese of Lexington*, 759 S.W.2d 583, 585 (Ky. 1988); *Piletich v. Deretich*, 328 N.W.2d 696, 700 (Minn. 1982).[12]

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[11] For a particularly thoughtful analysis of why the neutral principles of law approach is constitutionally mandated whenever there is an "absence of clear expressions" in the governing church documents about the right of a local church to withdraw its affiliation, about the disposition of property in such a case, and about who is authorized to make such determinations, see *Protestant Episcopal Church in Diocese of N.J. v. Graves*, 417 A.2d 19, 25-31 (N.J. 1980) (Schreiber, J., dissenting).

[12] Other States have adopted a neutral principles approach as preferred, but not necessarily constitutionally mandated. These cases include: *Arkansas Presbytery*, 40 S.W.3d, at 339; *East Lake Methodist Episcopal Church, Inc. v. Trustees of the Peninsula-Delaware Annual Conf. of United Methodist Church*, 731 A.2d 798, 808 (Del. 1999); *Meshel v. Ohev Sholom Talmud*

At the other end of the spectrum are States such as West Virginia and New Jersey, holding that deference to the hierarchical church is constitutionally compelled, albeit after sometimes blending the line between a property dispute and an ecclesiastical one. *Church of God of Madison v. Noel*, 318 S.E.2d 920, 923 (W.Va. 1984) (holding, in a church property dispute, that "[w]here the proper hierarchical authority has decided a question of church doctrine, practice or government, the courts *must decline* to intervene" (emphasis added)); *id.*, at 924 (Miller, J., dissenting) (noting that the majority opinion suggests "that once a court finds a church to be hierarchical in structure, it *must defer* to the decision of the church's highest tribunal" (emphasis added)); *Protestant Episcopal Church in Diocese of N.J. v. Graves*, 417 A.2d 19, 24 (N.J. 1980) ("Only where no hierarchical control is involved, should the neutral principles of law princi-

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Torah, 869 A.2d 343, 354 (D.C. 2005); *Graffam v. Wray*, 437 A.2d 627, 634-35 (Me. 1981); *Babcock Mem'l Presbyterian Church v. Presbytery of Balt. of United Presbyterian Church in U.S.*, 464 A.2d 1008, 1016 (Md. 1983); *Fortin v. Roman Catholic Bishop of Worcester*, 625 N.E.2d 1352, 1356-57 (Mass. 1994); *Church of God Pentecostal, Inc. v. Freewill Pentecostal Church of God, Inc.*, 716 So.2d 200, 206 (Miss. 1998); *Presbytery of Elijah Parish Lovejoy v. Jaeggi*, 682 S.W.2d 465, 467 (Mo. 1984) (en banc); *First Presbyterian Church of Schenectady v. United Presbyterian Church in U.S.*, 464 N.E.2d 454, 459-60 (N.Y. 1984); *Presbytery of Beaver-Butler of United Presbyterian Church in U.S. v. Middlesex Presbyterian Church*, 489 A.2d 1317, 1323 (Pa. 1985); *Foss v. Dykstra*, 319 N.W.2d 499, 500 (S.D. 1982); *see also Grutka v. Clifford*, 445 N.E. 2d 1015, 1021 n.4 (Ind. Ct. App. 1983); *Avondale Church of Christ v. Merrill Lynch*, 2008 WL 4853085, *5, No. E2007 02335-COA-R3-CV (Tenn. Ct. App. Nov. 10, 2008).

ple be called into play");[13] *cf. Parish of the Advent v. Protestant Episcopal Diocese of Mass.*, 688 N.E.2d 923, 932-33 (Mass. 1997) (holding that a dispute between factions of the local church over control of the local corporation and its property does not permit a *Jones*-type neutral principles analysis); *Presbytery of Cimarron v. Westminster Presbyterian Church*, 515 P.2d 211, 216-17 (Okla. 1973) (holding, pre-*Jones*, that the "Court is not free" to apply a neutral principles of law approach once a local church has affiliated with a national, hierarchical church).[14]

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[13] The Third Circuit has subsequently noted that the New Jersey Supreme Court may have moved away from that position, citing *dicta* in *Elmora Hebrew Ctr., Inc. v. Fishman*, 593 A.2d 725, 729-30 (N.J. 1991), that neutral principles *may* be employed, where appropriate, "[w]ithout regard to the governing structure of a particular church." *Scotts African Union Methodist Protestant Church v. Conference of African Union First Colored Methodist Protestant Church*, 98 F.3d 78, 92-93 (CA3 1996).

[14] Several other state courts apply the hierarchical deference approach as preferred, though not necessarily constitutionally mandated. *See, e.g., Mills v. Baldwin*, 362 So.2d 2, 6-7 (Fla. 1978), *reinstated after remand*, 377 So.2d 971 (Fla. 1979) (applying *Watson*'s hierarchical deference approach even after GVR following *Jones*); *Cumberland Presbytery of Synod of the Mid-West of Cumberland Presbyterian Church v. Branstetter*, 824 S.W.2d 417, 418-19 (Ky. 1992); *Tea v. Protestant Episcopal Church in Diocese of Nev.*, 610 P.2d 182, 184 (Nev. 1980) (held PECUSA is hierarchical, so property belonged to diocese); *see also Bennison v. Sharp*, 329 N.W.2d 466, 474 (Mich. Ct. App. 1982) (local church disaffiliated shortly after the Dennis Canon was adopted, but that was deemed irrelevant because the Court concluded that the Episcopal Church was a hierarchical church and then deferred to the hierarchy); *Calvary Presbyterian Church v. Presbytery of Lake Huron of United Presbyterian Church in U.S.*, 384 N.W.2d 92, 95 (Mich. Ct. App. 1986);

To one degree or another, the decisions mandating a hierarchical-deference approach all draw sustenance from the position articulated by Justice Powell in his dissenting opinion in *Jones*, contending that the neutral principles approach leads to "indirect interference by the civil courts with the resolution of religious disputes within the church [that] is no less proscribed by the First Amendment than is the direct decision of questions of doctrine and practice." *Jones*, 443 U.S., at 613 (Powell, J., dissenting). But they ignore contrasting language in the *Jones* majority opinion, where Justice Blackmun noted that "even in *Watson*," in which the hierarchical deference approach was adopted, the Court stated that, regardless of the form of church government, it would be the 'obvious duty' of a civil tribunal to enforce the 'express terms' of a deed, will, or other instrument of church property ownership." *Jones*, 443 U.S., at 603 n.3 (quoting *Watson*, 80 U.S. (13 Wall.), at 722-23).

Daniel v. Wray, 580 S.E.2d 711, 717 (N.C. Ct. App. 2003) (used hierarchical deference because it viewed the Episcopal Church as "connectional," not "congregational"); *Schismatic & Purported Casa Linda Presbyterian Church in Am. v. Grace Union Presbytery, Inc.*, 710 S.W.2d 700, 705-07 (Tex. Ct. App. 1986) (relying on *Brown v. Clark*, 116 S.W. 360 (Tex. 1909), in applying strict hierarchical deference, despite recognition that the *Brown* Court "may have felt compelled to follow the deference rule because it thought the *Watson* decision required its application at the time *Brown v. Clark* was decided"); *Southside Tabernacle v. Pentecostal Church of God, Pac. Nw. Dist., Inc.*, 650 P.2d 231, 235-36 (Wash. Ct. App. 1982) (finding hierarchical structure dispositive, but remanding for factual determination on whether the church was hierarchical or congregational).

The California Court in this case pursued still another course, claiming to adopt the neutral principles methodology approved by this Court in *Jones* but in actuality following a deference-to-hierarchy model, as Justice Kennard pointed out in her dissenting opinion. Pet. App. 41a-42a.

The simple fact is that the interplay between *Jones*, on the one hand, and *Milivojevich* and *Watson*, on the other, "have caused confusion over whether deference to the decision rendered by the highest church judicatory to which it was presented in a hierarchical church is mandatory, or, whether civil courts can apply neutral principles even if the church is recognized to be hierarchical." *Southside Tabernacle*, 650 P.2d, at 234 n.2. That some state courts continue to think a *Watson* hierarchical deference approach to a property dispute is constitutionally mandated, while others think it is constitutionally forbidden, and still others, like California here, follow some amalgam of the two methodologies, demonstrates that further clarification from this Court is warranted.

The variety of interpretations given even to the neutral principles approach alone is dizzying. As one state judge noted after surveying the relevant cases:

> Apparently, the Supreme Court's optimistic conclusions concerning neutral principles have been misplaced. What has emerged is a welter of contradictory and confusing case law largely devoid of certainty, consistency, or sustained analysis.

J. Fennelly, *Property Disputes and Religious Schisms: Who Is the Church?*, 9 St. Thomas L. Rev. 319, 353 (1997). As Professor Kent Greenawalt has noted:

> the present law is highly unpredictable for religious groups that are neither as rigorously hierarchical as the Roman Catholic Church, nor as straightforwardly congregational as the Old Congregational Churches. As a result, the law's application is highly unpredictable for a vast range of religious organizations in the country.

Greenawalt, *supra*, at 1902. Denominations, as well as their local church affiliates, simply need greater certainty to their efforts to clarify the nature of local church property ownership than is available at present.

Despite the confusion, the problem is by no means intractable. Much of the existing confusion in the application of the neutral principles methodology can be traced to the inclusion of a denomination's constitution in the litany of sources of neutral principles of law articulated by this Court in *Jones*, just as Justice Powell predicted in his dissenting opinion. *Jones*, 443 U.S., at 612 (Powell, J., dissenting). Questions such as whether a trust provision in a denomination's rules was added before or after a local church affiliated with the denomination, or before or after a local church took title to property, or whether the process by which the trust provision was added to the denomination's documents met the normal legal requirements for the creation of trust interests, should be tested in the crucible of litigation under neutral principles of state law before dispositive

weight is given to denominational rules, lest the courts become entangled with church polity and doctrine.

Confronted with just such concerns, the New Hampshire Supreme Court has adopted a view of neutral principles that first considers "only secular documents such as trusts, deeds, and statutes" lest the courts become impermissibly entangled with questions of church doctrine, permitting a review of religious documents such as church constitutions and bylaws "only if" the secular documents leave ownership unclear under state property laws. *Berthiaume v. McCormack*, 891 A.2d 539, 547 (N.H. 2006).

Certiorari is warranted here to consider whether such a "pure" version of neutral principles, relying on ordinary secular rules of property ownership, would both resolve much of the confusion and conflict in the state courts and be more constitutionally sound than permitting, as the California court did below, a controverted, post-hoc church rule to trump clear secular legal documents and longstanding trust statutes regarding property ownership.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

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